

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6105

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
IVAN S. FISHER,

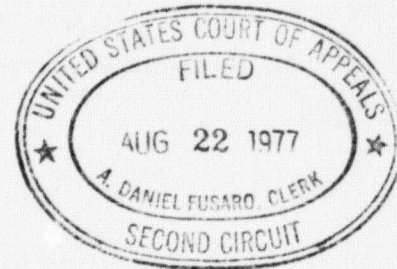
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.
-----X

B
PS
Docket No.
77-6105



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

JEFFREY D. ULLMAN
Attorney for Appellant
400 Park Avenue
New York, New York 10022
(212) 355-2380

PAGINATION AS IN ORIGINAL COPY

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DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCK YR. NU
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PLAINTIFFS						DEFENDANTS					

FISHER, IVAN S.

U.S.A.

IVAN STEPHAN FISHER

UNITED STATES OF AMERICA

T-26, U.S.C. Sect. 7426 - Wrongful tax levy

CAUSE

Relating Case - 76 CR 153

ATTORNEYS

For Plaintiff:

Ivan S. Fisher, Esq.
 410 Park Avenue
 New York NL 10022
 212 355 2380

For def:

U.S. atty. EDWARD S. RUDOF

760 2212

IVAN S. FISHER,

V S. U.S.A.

DATE	NR.	PROCEEDINGS
12/8/76		complaint filed/ summons issued. (1)
12-9-76	xxxx	By DOOLING, J.--Order to show cause dtd 12-8-76 ret. 12-13-76 fy
12-9-76		Summons ret. and filed/ executed (2)
12-10-76		By DOOLING, J.--Order to show cause dtd 12-8-76 ret. 12-13-76 for an order enjoining the enforcement of any and all leins or levys filed on behalf of the IRS against \$58,000 in U.S. currency etc. filed without proof of service. (3)
12-10-76	xxxx	
12/23/76		Before Dooling, J--case called motion to remit argued decision reserv
12/29/76		By Dooling, J dtd 12/28/76-memo and order-re at the same time it is clear enough that the dispositive issues are not of any great factual complexity, and all of the papers necessary to determine whether or no summary judgement is possible could well be filed by the Govt by 2/14/ etc filed. (4)
1-18-77		Supplemental affidavit of Ivan S. Fisher filed with memo of law and affidavit of Henry G. Londono. (5/6/)
2/7/77		Letter filed dtd 2/3/77 to Judge Dooling from Jerome Gink - Chief Trial Section, Northern Region, re: offer in compromise in this case. (8)
2/9/77		Answer of def. filed. (9)4
3/17/77		Defts memo of law in opposition to plttfs motion for summary judgement and in support of its motion for summary judgement filed. (10)
3/18/77		Letter of Ivan Stephan Fisher to Dooling, J dtd 3/14/77 filed re advising that efforts to reach settlement has failed etc. (11)
3-21-77		By DOOLING, J-Memo & Order dtd 3-18-77 that the deposition of Henry G. Londono be taken on or before 4-7-77 at the Queens House of Detention for Men at a place and hour to be arranged by counsel etc filed. (1)
3/25/77		Notice of cross-motion for summary judgment ret. 4/14/77 for def. filed by AUSA, Edward S. Rudofsky, <i>lg</i> . (13)
3/31/77		Petition for writ filed and petition for writ issued. (1)
4/13/77		Deft's supp memo of law filed. (15)
4/14/77		Before Dooling, J--case called plttf moves for summary judgement-deft moves for summary judgement -decision reserved.
5/12/77		Letter filed dtd 4/18/77, to Judge Dooling from Edward S. Rudofsky AUSA, re: photocopies of various letters requested by the Judge during the 4/14/77 hearing. tk (16)
5/12/77		Letter filed to Judge Dooling from Jeffrey D. Ullman, dtd 1/19/76, re: enclosure of documents = memo of law, etc. tk (17)
5/12/77		Copy of Plttfs memorandum of law and copy of reply memo of law filed. (18 & 19)
5/16/77		Deposition transcript of Ivan S. Fisher, taken by the deft dtd 4/7/77 at 2:00 p.m. filed. (20)
5/16/77		Deposition transcript of HENRY GOMEZ-LONDONO, taken by the deft dtd 4/7/77 at 4:15 p.m. filed. (2)

5/16/77 By DOOLING, J. - Order filed dtd 5/13/77 that the motion of the deft for summary judgment is granted and the motion of the plttf for summary judgment is denied and the Clerk is directed to enter judgment that plttf take nothing and that the action is dismissed by reasons of the provisions of T-31, U.S.C. Sect. 203 with costs as taxed by the Clerk. tk (2)

5/16/77 Judgment dtd 5/16/77 filed re that plttf take nothing of the deft and that the deft's motion for summary judgment is granted and that plttf's motion for summary judgment is denied and the action is dismissed with costs as taxed by the Clerk. jlj (23)

(Continued)

IVAN S. FISHER v UNITED STATES OF AMERICA
CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 76-C-
IVAN S. FISHER	U.S.A.	PAGE ____ OF ____ PA

DATE	NR.	PROCEEDINGS
6/24/77		Notice of Appeal filed. Copy mailed to C. of A.
7/11/77		Copy of scheduling order received from the C of A and filed. tk
7/15/77		Entire Record on Appeal certified and mailed to Court of Appeals.
7/25/77		Acknowledgment received from C. of A. for entire record on appeal filed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A-4

-----X
IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,
-----X

:

:

:

:

76 C 2212

MEMORANDUM

and

ORDER

Appearances:

JEFFREY D. ULLMAN, Esq., for plaintiff

VICKI G. CHEIKES, Esq., and EDWARD S. RUDOFISKY,
Esq. (DAVID G. TRAGER, Esq., United States
Attorney, of Counsel) and DEBORAH R. LIMFIELD,
Law Student Intern

DOOLING, D.J.

Plaintiff has sued under Section 7426(a)(1) of the Internal Revenue Code to recover from the Government \$57,870 in United States Currency that was seized from one Henry Gomez Londono on or about February 22, 1976, at Kennedy Airport. Plaintiff claims that Gomez Londono assigned to plaintiff all Gomez Londono's right, title and interest in and to the currency so seized on March 5, 1976, in connection with Gomez Londono's retaining of plaintiff to represent him in the criminal matter arising out of the airport incident on February 22d. If it is necessary to the disposition of the party's cross-motions, in effect, for summary judgment, to be able to find that

the assignment was an unconditional assignment of the whole amount of the currency, summary judgment cannot be granted. While the writing is clear and the assertions of the plaintiff explicit and unconditional, the later action of plaintiff in releasing his claim in part to furnish security for Mario Gomez Londono and the confused and uncertain tenor of the testimony on deposition of Henry Gomez Londono, and possibly other circumstances, would preclude a finding that there is no genuine issue of fact respecting plaintiff's contention that the transfer of interest was total and unconditional. However, both parties suggest that without disposing of that issue, summary judgment may be possible on other issues that may be dispositive.

The Government contends that the assignment is ineffective because of the provisions of 31 U.S.C. 203 which provides, in part that

"All transfers and assignments made of any claim upon the United States, ... whether absolute or conditional, and whatever may be the consideration therefor, ... except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

The Government argues also that the assignment is invalid under the provisions of Section 488 of the New York Judiciary Law; that statute forbids attorneys "taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon."

Plaintiff contends that at the time of the seizure Gomez Londono was unquestionably the owner of the property and in consequence the claim that he puts forward through plaintiff as his transferee is not a claim against the United States but a claim to the currency as his property, simply in the possession of the United States; and, indeed, the assignment reads as an assignment of all Gomez Londono's "right, title and interest to all United States Currency seized from me and my belongings ... on or about February 22, 1976". See United States v. \$22,993.00 in Currency, E.D.La. 1971, 332 F.Supp. 1277, 1279.

The Government's claim is based not simply on the seizure of the currency under the search warrant as evidence. It relies also upon seizure for forfeiture under 31 U.S.C. 1102(a); that section provides that any monetary instruments which are in the process of any transportation with respect to which a report required to be filed under

§ 1101(a) has not been filed "are subject to seizure and forfeiture to the United States."

Two seizures are involved. The first seizure took place on February 22 when the Customs Agents took possession of \$11,004 in United States Currency which Gomez Londono was carrying on his person. The record indicates that administratively the Customs Agents reported the seizure as one made incident to Gomez Londono's arrest and reference was made to 31 U.S.C. §§1101(report requirement), 1102 (seizure and forfeiture of monetary instruments), 1058 (criminal penalty of misdemeanor), and 1059 (additional criminal penalty for aggravated offense). By letter of March 2, 1976 addressed to Henry Gomez Londono at an address in Jackson Heights the Area Director of the Customs Service, by deputy, informed Gomez Londono that he had "incurred the forfeiture of \$11,004.00 pursuant to Title 31, U.S.C. 1103 for the reason that you failed to file a proper report required by Title 31, U.S.C. 1101 upon your departure from this port on February 22, 1976, with money ... in excess of \$5,000." The letter advised Gomez Londono of his right under 19 U.S.C. 1618 to petition for relief from the forfeiture and told him where to present such a petition and the time limit on presentation.

Section 1103 is the "civil liability" section of the Currency and Foreign Transactions Reports chapter of Title 31, and it provides that the Secretary may assess a civil penalty upon one who fails to file a report required under Section 1101 or who files a false report. The liability of Section 1103 must be "reduced by any amount actually forfeited under section 1102". Section 1102(a) provides:

"Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States."

The regulations under the statute, 31 C.F.R. Section 103.48, do not elaborate on the language of Section 1102, but simply point out that currency in process of any transportation with respect to which a report is required is subject to seizure and forfeiture if the report has not been filed or is false and note that the Secretary may well in his sole discretion remit or mitigate any such forfeiture in whole or in part upon such terms as he deems reasonable. No proceeding further to enforce the forfeiture (28 U.S.C. 2461(b)) was initiated and the Area Director's letter of

March 2, 1976, was returned to the Customs Service undelivered.

The \$44,780 in currency was seized under a search warrant issued on February 24, 1976. The search warrant was addressed to currency concealed in described luggage in violation of 31 U.S.C. 1101(b), 1058 and 1059 and 18 U.S.C. 1001. The warrant authorized the Special Agents^a of the Customs Service to make/search for the property and if it was found to seize it, to prepare a written inventory of the property seized and promptly to return the warrant, and bring the property before the Magistrate, as required by law. The currency was seized under the warrant on February 24, 1976, and the return and inventory were made on February 27, 1976.

Gomez Londono was indicted on March 2, 1976; he was arraigned and, on March 12, 1976, he was released on bail upon the application of plaintiff and upon Gomez Londono's execution of a personal appearance bond in the amount of \$75,000 secured by \$58,870 presently in possession of the Government. At the hearing at which the bail terms were established plaintiff said (Tr. 5)

"What we propose to do with the Court's approval is sign a personal recognizance bond in the amount of \$75,000 assured by the defendant's rights, title and interest

to the money which we admit was his.

"The Court: Which you believe is his?"

"Mr. Fisher: That is the better word"

It was noted during the bail hearing that if the Government prevailed in the litigation there probably would be a forfeiture hearing (Tr. 7).

On April 2, 1976, the Area Director of the Customs Service addressed a second letter to Henry Gomez Londono at the Jackson Heights address informing him that he had incurred the forfeiture of \$44,780 pursuant to Title 31 U.S.C. 1103 by reason of his failure to file a proper report under 31 U.S.C. 1101 upon his departure from the Port on February 22, 1976. The letter, as before, directed the addressee's attention to his right to apply for relief under 19 U.S.C. 1618 and explained to whom the petition was to be sent and the time within which it had to be sent. The letter was returned undelivered.

No forfeiture proceeding was commenced with respect to the \$44,780 of currency seized under the search warrant.

1. Critical to plaintiff's contention is the distinction made in United States v. \$22,993 In Currency, supra, 332 F. Supp. at 1279, between claims against the United States and claims to property not owned by but in the possession

of the United States. It is not easy to determine to what extent Judge Rubin based his application of the distinction on the fact that the seizure had been made under a statute that was unconstitutional (Marchetti v. United States, 1968, 390 U.S. 39; Grosso v. United States, 1968, 390 U.S. 62) and its seizure provisions unenforceable in consequence (United States v. United States Coin and Currency, 1971, 401 U.S. 715, 721-722). He noted that it was "agreed that the seized property is not contraband and is not, therefore, forfeitable per se." Judge Rubin said also (at 1279)

"Had ownership vested in the United States by mere seizure of the property, it would have been unnecessary for the United States to institute this forfeiture proceeding. The United States remained merely a claimant of the property. Ownership of the property remained in the original owners, [the assignors]."

The predicate of Judge Rubin's conclusion was, thus, that the United States and the assignors (and, later, the assignees) were rival claimants of property that was in the custody of the law. Cf. King v. United States, D. Colorado 1968, 292 F.Supp. 767, 773 (Government's possession a mere custody and not possession with intent to take the property interest).

United States v. One 6.5 MM. Mannlicher-Carcano Military Rifle, N.D.Tex. 1966, 250 F.Supp.410, was an action to forfeit two weapons in which one King appeared as a claimant, showing that he had bought the weapons a year after they came into the Government's possession; King knew they were in the Government's possession but the Government did not assert a right to forfeit or commence a forfeiture action until some months after King's purchase. The District Court awarded forfeiture to the Government, treating it as acquiring the property in them under the Firearms Act as of the date of their irregular purchase by Oswald, saying that (250 F.Supp. at 415):

"Formal declaration of forfeiture relates back to that time and avoids all intervening sales, even to innocent purchasers;"

The District Court did not discuss 31 U.S.C. 203 nor did the Court of Appeals when it reversed on the ground that the weapons could not be forfeited under the Firearms Act (see King v. United States, 5th Cir. 1966, 364 F.2d 235), nor on the later appeal from the District Court's refusal to entertain King's claim for compensation under the special condemnation law, Public Law 89-318 (United States v. One 6.5 MM. Mannlicher-Carcano Military Rifle, 5th Cir. 1969, 406 F.2d 1170). In the Colorado just compensation

case, King v. United States, supra, 292 F.Supp. at 773, the Court concluded that the United States did not indicate an intention to "take" a property interest in the weapons until Public Law 89-318 was enacted, some months after King had bought the weapons.

Generally forfeiture is thought of as taking effect when the offense giving rise to the forfeiture is committed, and, as it was expressed in United States v. Stowell, 1889, 133 U.S. 1

"... the right to the property then vests in the United States, although their title is not perfected until judicial condemnation ... the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations ..."

See also United States v. One Hundred Barrels Distilled

Spirits, 1872, 81 U.S. 44. And the Court in Ivers v. United States, N.D.Cal. 1975, 413 F.Supp. 394, 399, treated the Stowell analysis as applicable to the Currency and Foreign Transactions Reports Act. See also State of New Jersey v. Moriarity, D.N.J. 1967, 268 F.Supp. 546, 562-563, indicating that the concept is of general application. Cf. Texas v. Donoghue, 1938, 302 U.S. 284, 288-289. The forfeiture may be defeated by a failure to give proper notice

of the forfeiture proceedings (Robinson v. Hanrahan, 1972, 409 U.S. 38; Jaekel v. United States, S.D.N.Y. 1969, 304 F.Supp. 993), and, of course, if it is shown that the offense occasioning the forfeiture was not in fact committed.

The cases that have recognized a transfer of interest are, then, cases in which the Courts held that property interests can be transferred even when the property is in the Government's possession, if the Government asserts no rival claim of right that predates or is coincident with its taking the property into its possession. Where it is clear that the Government correctly asserts a right to forfeit property that it has seized, a later attempted transfer of the property or of the right to its proceeds is ineffective under 31 U.S.C. 203. In re Cargo of Intoxicating Liquors, E.D.N.Y. 1929, 40 F.2d 72; Sturchler v. Hicks, E.D.N.Y. 1926, 17 F.2d 321, 324; cf. United States v. Gillis, 1877, 95 U.S. 407, 414-416. In the present case the Government proceeded under a statute that empowered it to forfeit the money; it seized the money and manifested its purpose to forfeit well in advance of the decision that concluded that the offense authorizing forfeiture had not, on the stipulated facts, been committed.

The precise question is whether the legal interest that Gomez Londono had (and has) in regaining the money was (and is) a claim against the United States or a claim to the property of such sort that a transfer of the property, or, more practically, of Gomez Londono's legal interest in its recovery, was not an attempted transfer of a claim against the United States within the proscription of 31 U.S.C. 203. Whatever may be the general validity of the distinction between claims against the United States and claims to property in the possession of the United States, Gomez Londono's attempted transfer of interest is within the prohibition of 31 U.S.C. 203. The transfer involves just the risks of double claiming and controversy that the statute was meant to avoid. The money, from the moments of seizure forward, was in evident jeopardy of complete or partial divestiture and it was evidently recoverable, if recoverable, only through litigation in which, substantively, the defendant would be the United States. The claim to the money was at best a jus in personam ad rem rather than a right in rem, and the right was contested, and it was asserted against a sovereign. That the instrument of March 5, 1973, took the form of a transfer of the money seized could not save it from being

a forbidden assignment of a claim against the United States. Cf. United States v. Dow, 1958, 357 U.S. 17. While 28 U.S.C. 2463 plainly applies to revenue seizures (see, e.g., 26 U.S.C. 7301 et seq. and 7341 et seq.), it does not imply that every seizure under every statute was by its enactment reduced to a bare custodianship. The purpose of the statute, the Court has held, was to prevent state courts from interfering with the collection of the federal revenues; that was accomplished by centering jurisdiction in the federal courts; New Hampshire Fire Ins. Co. v. Scanlon, 1960, 362 U.S. 404, made clear that Section 2463 did not create a summary remedy nor transfer custody of property seized by revenue officers into the hands of officers of the federal courts.

2. The objection to the assignment made under Section 488 of the Judiciary Law of New York is not valid. The embrace of the statute is difficult to measure, but it is clear enough that it does not reach an assignment to an attorney for value simply because it is the expectation of assignor and assignee that the claim will have to be enforced by suit. Here the assignment was made to pay or secure the payment of a fee to the assignee and involved the probability that the assignee would have to sue to

enforce the claim. The statute is addressed to assignments made for the "very purpose" or the "primary purpose" of enabling the assignee-lawyer to commence suit on the claim. It is to be noted that the statute, in requiring that the assignment of claim be "with the intent and for the purpose of bringing an action thereon" was not being redundant, but, by requiring both intent and purpose, was giving precise definition to the narrow class of assignments it meant to outlaw. The cases are clear on the point. Moses v. McDivitt, 1882, 88 N.Y. 62; Sprung v. Jaffe, 1957, 3 N.Y. 2d 539; Pugh v. Lu-Kay Holding Corp., Bronx Co. 1971, 319 N.Y.S. 2d 716.

3. It has been indicated that by appropriate administrative procedures there should be no difficulty in making available to Henry Gomez Londono that part of the money seized which is in excess of the Government's tax claim. Since the present disposition of the case turns solely on the validity of the March 5, 1976, instrument as against the United States, and not on its effect as between plaintiff and Henry Gomez Londono, the circumstance that the Government does not claim the right longer to retain the whole of the amount involved does not furnish a reason for denying the Government's motion for

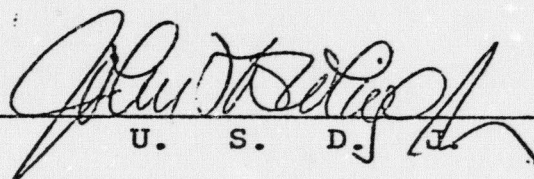
summary judgment.

It is

ORDERED that the motion of the defendant for summary judgment is granted and the motion of the plaintiff for summary judgment is denied and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed by reason of the provisions of 31 U.S.C. 203, with costs as taxed by the Clerk.

Brooklyn, New York

May 13, 1977.


U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76C 2212

-----X
IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

76 C

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Ivan S. Fisher, Esq.
sworn to December 8th, 1976, and the pleadings heretofore
submitted, and sufficient cause appearing therefore, it is

ORDERED, that the United States of America show cause
before this Court, to be held at Courtroom 8, United States
Court House, 225 Cadman Plaza East, Brooklyn, New York, on the
13 day of December, 1976, at 4:30 P. M. in the afternoon,
or as soon thereafter as counsel may be heard, why an order
should not be entered herein enjoining the enforcement of any
and all liens or levys filed on behalf of the Internal Revenue
Service against approximately \$58,000 in United States currency
seized by agents of the United States from Henry Gomez Londono at
John F. Kennedy International Airport on or about February 22,
1976, and directing the return of this money to plaintiff forthwith;
and it is

FURTHER ORDERED, that personal service of a copy of this order and the supporting papers made upon the United States Attorney, Eastern District of New York, on or before December 9, 1976, be deemed sufficient service thereof.

Dated: New York, New York
December _____, 1976

Dooling
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IVAN S. FISHER,	:	
Plaintiff	:	76 C
-against-	:	<u>AFFIDAVIT</u>
UNITED STATES OF AMERICA,	:	
Defendant.	:	

-----X

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

IVAN S. FISHER, being duly sworn, deposes and says:

1. I am the plaintiff above-named and am a member of the Bar of this Court. I am appearing pro se in connection with the above-entitled action, and make this affidavit in support of the relief requested in the foregoing Order to Show Cause. This proceeding for injunctive and related relief is brought pursuant to Section 7426 of the Internal Revenue Code of 1954 (26 U.S.C. §7426 (a) (1)).

2. On or about February 22, 1976, agents of the United States Customs Service arrested one Henry Gomez Londono, and seized from his person and luggage approximately \$58,000 in United States currency. On or about March 5, 1976, Henry Gomez Londono retained me to represent him in connection with the criminal prosecution which resulted from the seizure of this money, United States v. Henry Gomez Londono, 76 Cr.153 (E.D.N.Y.) (Dooling J.), and assigned to me all his right, title and interest

in the moneys seized in a written document, a copy of which is annexed hereto as Exhibit "A".

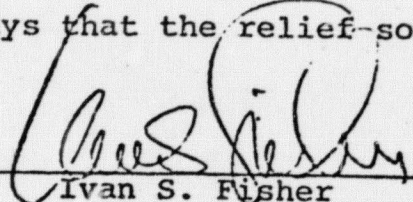
3. On November 17, 1976, in an opinion annexed hereto as Exhibit "B", the Honorable John F. Dooling, J., of this Court, granted defendant's motion to suppress the money and other physical evidence seized on or about February 22, 1976.

4. I am informed by Bernard J. Fried, Chief, Appeals Division, U.S. Attorney's Office, E.D.N.Y., and do believe, that, on or about December 1, 1976, the Internal Revenue Service ("IRS") caused a Notice of Lien as to this currency to be served upon Murray Jacobs, Chief Fines, Penalties and Forfeitures, U.S. Customs Service, Seaboard World Building (Building #178), John F. Kennedy International Airport, Jamaica, New York, the present custodian of the seized currency. Apparently, this action was taken pursuant to a jeopardy assessment made by IRS against Henry Gomez Londono.

5. As the foregoing makes clear, however, the money seized from Londono, although in the hands of the Custom Service, had previously been assigned to me, in consideration of legal services provided, approximately seven months prior to the service of the lien. Moreover, the United States Attorney's Office was on actual notice from me as to the existence of the assignment prior to the service of the lien.

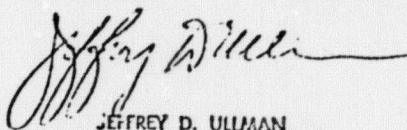
6. In light of the fact that there will be no substantial question of fact or law to be litigated in connection with this action, and in light of the fact that Plaintiff's entitlement to the moneys is clear, immediate relief is sought in the foregoing Order to Show Cause.

WHEREFORE, your deponent prays that the relief sought herein be granted.


Ivan S. Fisher

Sworn to before me

this 8th day of December, 1976.



JEFFREY D. ULLMAN
Notary Public, State of New York
No. 24-462154B
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
IVAN STEPHAN FISHER, :
 :
 Plaintiff, : 76 C
 :
 -against- : COMPLAINT
 :
 UNITED STATES OF AMERICA, :
 :
 Defendant. :
 -----X

Plaintiff, Ivan Stephan Fisher, by his attorneys, Ivan Stephan Fisher, Esq., complaining of defendant United States of America, alleges:

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1346 (e) as this is a civil action against the United States of America for a wrongful levy on property, pursuant to Section 7426 of the Internal Revenue Code of 1954 (26 U.S.C. §7426 (a) (1)).

2. Plaintiff is an attorney at law, duly licensed to practice in the State of New York and admitted to the Bar of this Court, with offices in the Borough of Manhattan, City and State of New York.

3. Upon information and belief, defendant, by and through its subsidiary agent, District Director of Internal Revenue Service, United States Department of Treasury, maintains offices at 120 Church Street, in the Borough of Manhattan, City and State of New York.

4. Upon information and belief, the subject matter of this action is a sum of approximately \$58,000 cash money presently held by the United States Customs Service, Seaboard World Building (Building #178) John F. Kennedy International Airport, Jamaica, New York, within this judicial district.

5. Upon information and belief, this aforesaid sum of approximately \$58,000 cash money was placed in the custody of the United States Customs Service after seizure at Kennedy Airport from the person and property of one Henry Gomez Londono, the money's rightful receipt, who presently resides at the Queens House of Detention, 126-02 82nd Avenue, Kew Gardens, New York, within this judicial district.

6. On or about February 22, 1976, agents of the United States Customs Service arrested one Henry Gomez Londono at John F. Kennedy International Airport as he was about to embark on an airplane flight to Colombia, South America. The basis for this arrest was Londono's purportedly false statements to Customs Agents regarding the amount of money he was taking out of the country, in supposed violation of 31 U.S.C. §1101 (b). According to the provisions of 31 U.S.C. §1101 (b), Londono was required to file a report declaring any moneys in excess of \$5,000 removed from the country. In fact, Londono had on his person and in his luggage approximately \$58,000. Indictment 76 CR 153 was subsequently filed in the United States District Court for the Eastern District of New York, charging, inter alia, violations of the Currency and Foreign Transactions Reporting Act of October 26, 1976 (31 U.S.C. §1051 et seq.), and 18 U.S.C. §1001.

7. In connection with the defense of the criminal charges filed in this case, plaintiff was retained by Londono to represent him. As part of the fee arrangement between Londono and plaintiff, Londono, in consideration of plaintiff's legal services and representation, executed an assignment which immediately conveyed to plaintiff all right, title and interest in all currency seized from his person and belongings at the time of arrest. This assignment, annexed hereto as Exhibit "A", was executed by Londono on March 5, 1976.

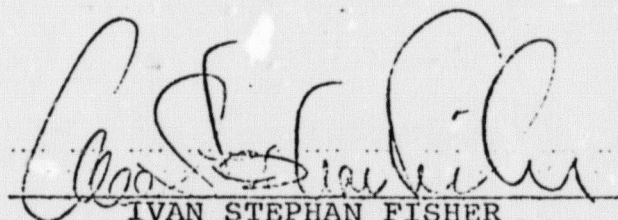
8. On November 17, 1976, by order of the Honorable John F. Dooling, J., of the United States District Court for Eastern District of New York, Londono's motion to suppress the physical evidence seized from his person and belongings (including the aforesaid cash money) was granted by the Court. United States v. Gomez-Londono, 76 Cr. 153 (E.D.N.Y., November 17, 1976).

9. Upon information and belief, subsequent to the Court's decision suppressing the seized evidence, the Internal Revenue Service placed a tax lien on the aforesaid cash money on or about December 1, 1976. This lien was served upon the present custodian of the seized funds, Murray Jacobs, Chief of the Fines, Penalties and Forfeitures Section of the United States Customs Service at John F. Kennedy International Airport. Upon information and belief, this tax lien was filed in order to secure funds in anticipation of the possible tax liability of Henry Gomez Londono.

10. Insofar as defendant's tax lien has been filed in order to secure funds in anticipation of Londono's tax liability, this lien has been illegally and improperly filed against assets presently belonging to plaintiff. By virtue of the assignment executed by Londono on March 5, 1976, as detailed above, Londono assigned to plaintiff all right, title and interest in the afore-said moneys. The defendant's tax lien seeks to wrongfully levy upon plaintiff's assets for Londono's possible tax liability out of assets no longer owned by Londono.

WHEREFORE, plaintiff demands judgement of the defendant:

- (A) Enjoining and vacating the tax lien placed upon the seized property by the defendant;
- (B) Ordering the return of the specific property presently in the possession of defendant;
- (C) Granting plaintiff judgment for the amount of money levied upon; and
- (D) Granting such other, further and different relief as to this Court appears just and proper.



IVAN STEPHAN FISHER
Attorney for Plaintiff
410 Park Avenue
New York, New York 10022
(212) 355-2380

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

:

:

:

76 C 2212
MEMORANDUM
and
ORDER

Plaintiff has sued under 26 U.S.C. § 7426(a)(1) to vacate the Government's tax lien on money seized from one Henry Gomez Londono, for the return of the seized property, and for judgment for the amount of the money seized and levied upon, and for other relief. Plaintiff's reliance is on a written assignment, signed by Henry Gomez Londono and dated March 5, 1976, in which Gomez Londono professed to assign to plaintiff "in consideration of legal representation rendered and to be rendered to me by him in defense of a prosecution" in this Court, 75 CR 153, all Gomez Londono's interest in \$58,780 seized from him at JFK Airport on or about February 22, 1976. Plaintiff states that he was retained by Gomez Londono on March 5, 1976, two days after the indictment in the present case was filed. After the indictment defendant moved, plaintiff acting as his counsel, to suppress the defendant's statements made at the time of the seizure of the money and the physical

2.

evidence obtained both from the defendant's person and under a search warrant issued at about that time. That motion was granted under date of November 17, 1976. The Government has appealed from the determination.

Plaintiff now moves by Order to Show Cause for substantially the relief demanded in the complaint. Plaintiff's argument is essentially that the facts are simple, and that there is no occasion to delay in disposing of the case because the Government's proceedings against Gomez Londono under the tax laws are of no import since they cannot attach to the money to which plaintiff is entitled under the earlier title of the March 5 assignment.

It appears that on or before December 1, 1976, the District Director of the Internal Revenue Service advised Gomez Londono that the Service had declared the taxable period January 1, 1976 to May 7, 1976, of Gomez Londono terminated, and that income tax for the terminated period was due and payable immediately in the amount of \$50,795.25 in accordance with an attached calculation which determined that Gomez Londono's gross income for the period comprised the total of the money seized at the airport, the bail that had been posted

3.

in the amount of \$41,000, and other income reflected in certain expenditures, aggregating about \$900.; gross income thus was determined to be \$97,685.14 against which was allowed a single exemption; a small credit against tax was also allowed. Gomez Londono was advised that he should file a tax return for the terminated period as well as for his ordinary accounting record, and that he would have an opportunity to request reconsideration if he protested promptly either that the collection of the tax liability was not in jeopardy or that the assessment was excessive. It does not appear that Gomez Londono filed any protest. Plaintiff in substance argues that his assignment is prior in time and therefore in right to the Government's assessment and that there is therefore nothing to litigate.

The case is not ripe for determination upon a motion of the kind now put forward. Plaintiff has in effect moved prematurely for summary judgment under Rule 56(a). The motion could not in regular course have been made before December 28 nor made returnable before January 7th at earliest, and, in view of the fact that the Government is accorded additional time to respond in all civil cases, it is not inappropriate to take account of that fact in the present case in determining a procedural schedule.

4.

At the same time it is clear enough that the dispositive issues are not of any great factual complexity, and all of the papers necessary to determine whether or not summary judgment is possible could well be filed by the Government by February 14, 1977. At that time a date for oral argument, if one is indicated could then be fixed. If, therefore, plaintiff wishes to press the present motion as a motion for summary judgment, he would be well advised to supplement the material already submitted. All plaintiff's further submissions should be filed and served not later than January 14, 1977, if plaintiff wishes to press the motion.

It is so ORDERED.

Brooklyn, New York

December 28, 1976.

JOHN F. DOOLING, JR.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
IVAN S. FISHER,

Plaintiff,

76 C 2212

-against-

: SUPPLEMENTAL AFFIDAVIT

UNITED STATES OF AMERICA,

Defendant.

-----X
STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

IVAN S. FISHER, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action, and I submit this Supplemental Affidavit in support of claims for relief previously transmitted to the Court.

2. As my previous Affidavit evidences, I am a member of the Bars of the State of New York and of this Court. The overwhelming bulk of my law practice consists of the representation of criminal defendants in federal prosecutions. It is my usual custom in such cases, to establish separate fees for separate services undertaken on behalf of individual clients. Thus, based, in part, upon such factors as the nature and seriousness of the charges against the defendant, the apparent complexity of the legal issues involved, the extent to which the services of investigative or forensic specialists will be necessary to an adequate defense, my evaluation of the likelihood of success, and the client's financial resources, I generally endeavor to reach agreement with a client on a fee arrangement for specific

services rendered, generally broken down into pre-trial, trial, appellate, and, where appropriate, post-conviction phases.

3. It has been my general experience that the vast majority of my clients prefer this kind of fee arrangement to the payment of a retainer supplemented on an hourly or per diem basis. In some circumstances, however, clients have expressed a preference for paying a set fee, in advance, for all defense services necessary in a given prosecution. I have found this latter preference particularly common among foreign born Hispanic clients, whose command of English, and experience in the United States, has been limited. It is often the case that such clients, thousands of miles from home, unable to communicate except through an interpreter and cut off from relatives, friends and the normal sources which one calls upon to raise funds for a defense, are inherently wary of their surroundings, and generally mistrustful of lawyers. This is often based upon their prior encounters with lawyers in their native countries, who, they feel, have failed to adequately protect their interests and to whom they believe they ultimately paid more money than initially agreed upon.

4. Under such circumstances, these clients generally insist upon paying a set fee for all services to be paid at once. It is my custom and practice to explain to such clients that it is impossible to determine, at that early stage, exactly how much time, effort and resources their defense will require. Although I can, and do, make what I believe to be an educated evaluation of what course the case is likely to take, and its probable success or failure, I emphasize to clients that my evaluation is exactly that: an educated estimate, nothing more.

5. Nevertheless, where a client insists, I will establish a single fee for all services to be rendered in connection with his defense. This includes arraignment, pre-trial appearances and motions, trial, appeal, and, where appropriate, collateral proceedings both in the courts and administrative agencies, such as the Immigration and Naturalization Service. Although my fee, under such circumstances, represents what I believe to be a realistic appraisal of the course a case will take, I have never abandoned a client at any stage of the proceedings, nor have I ever demanded more money than originally paid, when, as occasionally happens, the case takes an unanticipated turn and requires substantially more time, effort or expense than originally anticipated. It was precisely this kind of fee arrangement that I ultimately reached with Henry Gomez Londono.

6. I first met Henry Gomez Londono approximately two weeks after his arrest on February 22, 1976. At that time, Mr. Gomez Londono had been arraigned on Indictment 76 CR 153 (E.D.N.Y. charging him with violations 31 U.S.C. §1101(b) (The Bank Secrecy Act), 18 U.S.C. §1001 (making false statements), and 18 U.S.C. § 922 (e) (transportation of fire arms). At the time, Mr. Gomez Londono was incarcerated at the Metropolitan Correctional Center ("MCC"). My initial interview disclosed that he had been arrested at Kennedy Airport, following an encounter with agents of the United States Customs Service. A search of his person and luggage had disclosed that he was in possession of approximately \$60,000, which money had been seized and retained by the Customs Service. In addition, small arms were discovered in his luggage and other personal possessions loaded on board an Avianca Airlines jet at the time of his arrest.

7. My subsequent conversations with Jeffrey Kay, Esq., and Charles Clayman, Esq., the Assistant United States Attorneys having prosecutorial responsibility for the Gomez Londono case, revealed that information from a Colombian informant had led Government agents to believe that Londono would transport approximately \$100,000 in United States currency out of the United States on or about February 22, 1976, and that the purpose of Mr. Gomez Londono's departure with such a large sum of money was to engage in a narcotics transaction in Colombia. Based upon information provided by this informant, Customs agents established a surveillance at Kennedy Airport, located the defendant, and approached him as he walked toward the Avianca Airlines departure lounge. Advising him that federal law required the filing of a report in the event that more than \$5,000 United States currency was to be transported out of the country, the agents inquired of Londono, without advising him of any right to remain silent, whether he was in the process of transporting more than \$5,000 out of the United States. According to the Government, Gomez Londono denied on more than one occasion that he was transporting more than \$5,000 out of the United States, but handed the agents an envelope which, upon the government's opening, revealed \$10,000 in United States currency. Thereupon, the agents arrested Gomez Londono for making false statements and a violation of The Bank Secrecy Act. A subsequent search of his luggage revealed another \$47,870 and two handguns. Mr. Gomez Londono supplied me additional details of his interrogation by Customs Agents and the circumstances surrounding his arrest.

8. Thus, informed about the essential facts of the case, I explained to my client our contemplated course of action. I made it clear to him, however, that reduced bail was unlikely because of his lack of community ties and foreign origin.

However, I assured him that I would press for a prompt and speedy trial in the event that bail could not be reduced. Second, I advised him that the ultimate outcome of his case would probably turn upon our ability to suppress the evidence obtained by Customs Agents. I made clear to him that his case involved a variety of issues as to which the law was either unsettled or non-existent. I explained to him that The Bank Secrecy Act was fairly new, that initial research disclosed very few cases decided under it, and that we had uncovered no case involving facts similar to his case.

9. I emphasized to him that, while I believed there was a significant possibility that we would ultimately prevail on the suppression motion, this belief represented my own professional evaluation of the case, supported by no pre-existing case law squarely in point. My evaluation of the case was based upon the following considerations:

First, my client had been interrogated by Customs Agents at a time when they believed him to be a potential criminal defendant without having advised him of his rights to remain silent or to the assistance of counsel;

Second, my client had been arrested for, inter alia, the violation of a relatively obscure statute enacted five years earlier.

Under Lambert v. California, 355 U.S. 225 (1957)

I believed that Mr. Gomez Londono's ignorance

of his obligation to file the requisite report would provide a complete defense to a prosecution for a violation of 31 U.S.C. §1101(b);

Third, based upon my conversation with Mr. Gomez Londono and with the Government, I believed I could establish, at an evidentiary hearing, that my client's statements to Customs agents were not false statements within the meaning of 18 U.S.C. §1001; and

Finally, I believed that these factors would further enable us to successfully move to suppress the weapons found in Mr. Gomez Londono's constructive possession.

10. I carefully explained to Mr. Gomez Londono that it was impossible to predict with any degree of certainty what course the case was likely to take. I pointed out that, of course, we would move to suppress the evidence seized from him. I emphasized, however, all the possible permutations of future events following such a motion. I pointed out that, in the event we successfully suppressed the evidence, the Government would very likely appeal. I added that, in the event the Government prevailed in the suppression motion, we would ultimately appeal; but that no matter what the outcome before the District Court, one side or the other might ultimately seek review in the United States Supreme Court. I explained that, in the event we were unsuccessful in the suppression motion, or the Government prevailed on appeal, we would then have to try the case, and, in the event of conviction, we would appeal.

11. Nevertheless, despite these uncertainties, Mr. Gomez Londono insisted upon paying a single fee for all services to be performed by me. Mr. Gomez Londono informed me that \$10,000 in cash was available to pay my fee, in addition to the approximately \$60,000 seized from him by Customs agents.

I informed my client that the money seized from him would not be immediately available, that its ultimate recovery was impossible absent a judicial determination of the illegality of its seizure, and thus, that its present value to me was speculative, at best, in light of the plethora of the United States Code's forfeiture statutes. Thus, I advised him that, even in the event of our ultimate success, the return of the monies seized was an uncertain proposition.

12. In light of these circumstances, Mr. Gomez Londono's expressed mistrust of lawyers, and his desire to avoid any piecemeal fee arrangement, we ultimately agreed on a fixed fee for all services, including pre-trial motions, trial and appeal, as well as all expenses reasonably incident to those services. As pointed out supra, this retainer agreement was in all respects, similar in kind to those reached in other cases involving similarly situated clients.

13. It was mutually agreed that the fee for my representation of Mr. Gomez Londono would be \$10,000, plus an assignment of all Gomez Londono's right, title and interest in the monies seized from him by Customs agents. This fee was established by taking a variety of factors into account in addition to those set out, supra. Both the client and I recognized the services of an investigator to develop the factual background for our suppression motion would be necessary. Moreover, recognizing

that this motion required exploration of relatively virgin legal ground, it was understood that preparation of legal materials and research would involve substantial commitment of time and resources. Furthermore, because the fee covered all services rendered, and because, regardless of the outcome, an appeal was virtually certain, it was expressly understood that

the anticipated expenses of transcript and preparation of briefs were included as part of the fee arrangement. Finally, it was expressly understood that a significant possibility existed that the contemplated assignment would ultimately prove to be valueless, and that, in any event, a substantial probability existed that the Government would not voluntarily return the money absent litigation. Accordingly, I explained to Mr. Gomez Londono that the assignment was worth substantially less than its face value at the time it was made.

14. On or about March 5, 1976, Henry Gomez Londono's assignment to me of the approximately \$60,000 seized was memorialized in a written document prepared in English and translated to Mr. Gomez Londono by an interpreter then in my employ, Ms. Rose Yanez. A copy of that assignment, together with the interpreter's verification, is annexed hereto as Exhibits A-1 and A-2.

15. It was expressly understood at the time of the assignment that it constituted a present and irrevocable transfer to me of all of Henry Gomez Londono's right, title and interest in the monies seized as payment in advance for my undertaking to represent him. It was understood further that this assignment, together with \$10,000 in cash, constituted the entirety of my fee, regardless of what course the case took; that I would represent Mr. Gomez Londono in all phases of the prosecution

against him, including pre-trial proceedings, trial, appeal, and certiorari, if necessary. It was our clear understanding that our fee agreement was firm and fixed; that regardless of whether the prosecution against Gomez Londono were protracted or brief, no additional fee would be sought, and no additional monies forthcoming, with the only caveat that, in the event of substantial unanticipated expenses, the client would assume the cost of those expenses.

16. Almost immediately upon reaching agreement with my client, upon execution and delivery of the assignment, I retained the services of John McNally, Investigator, for the purpose of interviewing the Pan American Airways employee who had acted as interpreter between the Customs agents and Gomez Londono at the time of his interrogation. In addition, I dispatched my associate Barry A. Bohrer, Esq., to Kennedy Airport for the purpose of determining whether there existed any signs, posters or public display of any kind informing the traveling public of its obligation to file reports of the kind required under 31 U.S.C. §1101 (b). Simultaneously, I assigned to another associate, Jeffrey D. Ullman, Esq., the task of preliminary legal research of those issues deemed critical to, both, the suppression and the anticipated trial on the merits.

17. I met on several occasions thereafter with Messrs. Kay and Clayman, Esqs., for the purpose both of obtaining discovery as well as the Government's view of the relevant issues involved in this case. During one of those early conferences with these gentlemen I disclosed the fact of my assignment from Henry Gomez Londono of all of his right, title and interest in the monies seized, thus placing the Government on notice as to the existence of the assignment.

18. On or about March 15, 1976, I participated in a pre-trial conference with Mr. Kay in which I informed him that I believed it unlikely that my client would be eligible for release on bail, in light of the fact he was a Colombian national with few roots in the New York Area, who had, in fact, been arrested just prior to his departure from the United States. Believing that a defendant, unlikely to be admitted to bail, is entitled to a prompt determination of the accusation against him, I sought Mr. Kay's agreement as to an early trial date. Because such an agreement was not forthcoming, Mr. Kay and I agreed to an appropriate bail for my client. Accordingly, on or about March 14, 1976, Henry Gomez Londono was enlarged on his own recognizance, having signed a personal appearance bond secured only by the monies previously seized from him and presently in the hands of the Government.

19. Upon his release from the MCC, Mr. Gomez Londono was transferred to the custody of the Immigration and Naturalization Service (INS), which had lodged a detainer warrant against him. Bail was originally set by the Immigration and Naturalization Service in the amount of \$8,000. On March 15, 1976, upon application of my associate, Jeffrey D. Ullman, Esq., representing Gomez Londono in the INS bail reduction proceedings, bail was reduced to \$5,000. That bail was subsequently posted, and Gomez Londono was released on or about March 16, 1976. Mr. Gomez Londono remained at liberty, and appeared at all times required by the Court, until December , 1976, when he was arrested by New York State authorities upon an unrelated charge. Presently, Mr. Gomez Londono is incarcerated without bail in the Queens

House of Detention for Men. Although Mr. Gomez Londono and I could not have contemplated his subsequent arrest on a wholly- unre ed state case, I have undertaken to represent him in connection with those proceedings as well, at no additional fee.

20. Approximately one month after having been retained in United States v. Henry Gomez Londono, 76 CR 153 (S.D.N.Y.), I was subsequently retained to represent the defendant's brother, Mario Gomez Londono, as well, in a criminal prosecution then-pending against him, United States v. Mario Gomez Londono, 76 CR 223 (E.D.N.Y.).

21. In connection with my representation of Mario, I endeavored to secure his release on bail for the purpose of assisting in the investigation and preparation of his defense. Bail was ultimately fixed in the amount of \$50,000. Because only \$25,000 cash could be raised to underwrite a surety bond, I was approached by Henry Gomez Londono, and asked to reassign \$25,000 of his previous assignment to me. Upon learning that the Stuyvesant Insurance Company would accept such reassignment, I executed an assignment, in favor of Stuyvesant Insurance Company of \$25,000 of the right, title and interest previously assigned to me by Henry, to fulfill the Insurance Company's requirements for underwriting a surety bond securing Mario's bail. A copy of that assignment and related documents are annexed hereto as Exhibit B-1 and B-2.

22. I agreed to thus encumber \$25,000 of Henry's assignment to me for the following reasons:

First, there was no other source available for funds to secure Mario's release. His enlargement on bail was critical to the preparation of this defense, which required

witness who could be identified only by Mario, himself. In my eight years as a criminal defense attorney, I have never allowed a defendant to remain incarcerated where, from relatives or friends, funds were available to meet bail, even where these resources were pledged to me as part of a fee agreement;

Second, research disclosed that the prospect of ultimate recovery of the monies seized was substantially greater than anticipated at first, thus increasing my estimation of the assignment's value. In connection with my representation of a defendant in United States v. Eliseo Sanchez Rueda, 76 CR 625 (S.D.N.Y.), which also involved an unlawful seizure of money, research indicated that the Government had no right to the forfeiture of such money;

Third, the terms and conditions of the bond securing Mario's release were such that I believed his continued presence in the jurisdiction and his appearance in Court were well assured. Those terms and conditions included a "daylight hours only" release and required Mario to remain at all times in the custody of an investigator retained by me for the purpose of assisting in the preparation of that case. In light of the imminence of Mario's trial at the time of his release, I

felt that his departure from the jurisdiction was unlikely.*

* Regretably, on May 7, 1976, Mario did, in fact, escape from custody. He was not apprehended until August , 1976.

23. Throughout the Spring and Summer months, my preparation of Henry's defense continued. Based upon my conversations with the defendant, as well as government prosecutors, together with the information obtained from my investigator McNally, there appeared to be no serious dispute with respect to the relevant facts. Because research in preparation for the suppression motion revealed that the issues were predominantly legal, rather than factual, I discussed with my client the possibility of stipulating the facts, for all purposes, in order to sharply define and crystallize the relevant legal issues. I carefully explained to my client that he had an absolute right to a full hearing on the suppression motion as well as a full-scale trial, at which witnesses for both sides would be presented, examined and cross-examined. Nevertheless, in the belief that the Government's version of the events of February 22 favored our legal position, and because my conversations with Henry established his version of the incident did not differ substantially, I advised him that an effort to stipulate to the facts with the Government might well redound to his benefit. He agreed.

24. Thereafter, I negotiated an agreement on a stipulated set of facts to be used in lieu of a hearing on the suppression motion, and, if necessary, in lieu of testimony at trial. After several revisions, and modifications, formal agreement was reached, and the stipulation was added to the record on or about September 1, 1976.

25. Shortly thereafter I submitted to the Court a Memorandum of Law, outlining the issues believed critical to the determination of the motion. In my judgment, that thirty page Memorandum, a copy of which is annexed hereto as Exhibit C, thoroughly researched, analyzed and presented the relevant arguments and case law. The Memorandum was the product of many

hours of conversation between my associate and myself as well as many more hours of legal research and analysis. As set forth supra, the issues presented were in many respects novel.

Briefly, they involved the applicability of Miranda warnings in the context of an airport interrogation prior to arrest. Further, they involved the extent to which a defendant may be liable for making false statements under circumstances in which he is a target of investigation, and is interrogated by federal officials for the purpose of obtaining evidence against him, an issue never fully resolved in this Circuit. In addition, and most unique of all, the case required an analysis of the penal provisions of The Bank Secrecy Act, which, to my knowledge, no Court had ever undertaken. This Court ultimately granted the motion on November 17, 1976 in a written opinion annexed hereto.

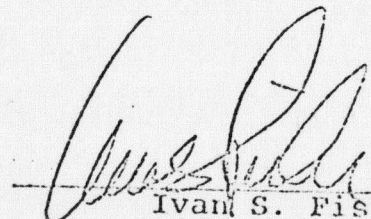
26. Indeed, the vast bulk of services to be performed on behalf of Henry Gomez Londono were performed in connection with this motion. Although the case presently is on appeal, the relevant and applicable law already has been thoroughly researched, analyzed and articulated by us in connection with our presentation of the suppression motion. Moreover, in the event the Court of Appeals should reverse this Court's order and certiorari is unavailing, the trial would be a relatively uncomplicated affair, in light of the previously-added stipulation and defendant's

27. Two weeks after this Court granted the suppression motion, and approximately ten months after Henry's arrest, the Internal Revenue Service ("IRS"), on December 1, 1976, formally advised him for the first time, of its assessment against him of income tax liability for the tax year beginning January 1, 1976, terminated unilaterally by IRS on May 7, 1976. A copy of the notice and demand for payment served upon Henry is annexed hereto as Exhibits E-1 through E-5.

28. On or about December 8, 1976, IRS filed a Notice of Levy with the United States Custom Service, in whose possession the monies seized from Henry had remained since the time of its seizure on February 22, 1976. A copy of the Notice of Levy is also annexed hereto, as Exhibit F .

Finally, it should be pointed out that no impediment exists ^{to} the maintenance of this action by virtue of the pendency of the criminal case against Henry Gomez Londono. By letter dated December 16, 1976, Bernard J. Fried, Chief of the Appeals Division, United States Attorney's Office, agreed that the excess over the Internal Revenue Service levy need not be retained in Government possession for evidentiary purposes in the event that United States v. Henry Gomez Londono, supra, ultimately went to trial, counsel for both parties having stipulated to the admissibility of a photographic facsimile of the money in the event that the money itself would otherwise be admissable. Exhibits G-1, G-2

DATED: New York, New York
January 14, 1976


Ivan S. Fisher

Sworn to before me this
14th day of January, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

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76 C 2212

AFFIDAVIT

STATE OF NEW YORK)

COUNTY OF QUEENS)

) ss.:
)

HENRY GOMEZ LONDONO, being duly sworn, deposes and
says:

I am the defendant in United States v. Henry Gomez Londono, 76 CR 153 (E.D.N.Y.). On or about March 5, 1976, I retained Ivan S. Fisher, Esq., 410 Park Avenue, New York, New York 10022 to represent me in connection with that prosecution.

Ms. Carmen Espinal, an interpreter associated with Mr. Fisher's office, has, this day, read to me in the Spanish language, an affidavit signed by Mr. Fisher, which affidavit, I am informed is to be submitted to the court in connection with the pending action entitled Ivan S. Fisher v. United States, 76 C 2212.

The statements made in that affidavit, relating to my understanding of the nature and affect of my assignment to Mr. Fisher of all of my right, title and interest in approximately \$60,000 seized from me on February 22, 1976, unconditionally and irrevocably, in paragraphs 6 through 15 in-

clusive, are, to my own personal knowledge and recollection,
true, accurate and complete.

I have not prepared this affidavit. It has, however,
been read to me in the Spanish language by Ms. Carmen Espanal,
and I adopt it as fully and completely as if I had prepared it
in my own hand.

Henry Gomez Londono

Sworn to before me this
14th day of January, 1976.

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AFFIDAVIT

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SS. :

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Common Name: _____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
IVAN STEPHAN FISHER, :
Plaintiff :
v. : CIVIL ACTION NO. 76C 2212
UNITED STATES OF AMERICA, : A N S W E R
Defendant :
-----x

The defendant, the United States of America, by its attorney, David G. Trager, the United States Attorney for the Eastern District of New York, in response to the complaint, answers and states:

FIRST DEFENSE

The complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

1. Denies the allegations in paragraph 1 of the complaint.
2. Admits the allegations in paragraph 2 of the complaint.
3. Admits the allegations in paragraph 3 of the complaint.
4. Admits the allegations in paragraph 4 of the complaint.
5. Admits that the sum of approximately \$58,000 was seized from Henry Gomez Londono by the United States Customs Service, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 5 of the complaint.
6. Admits the allegations in paragraph 6 of the complaint.
7. Denies the allegations in paragraph 7 of the complaint.
8. Admits the allegations in paragraph 8 of the complaint.
9. Admits the allegations in paragraph 9 of the complaint.

10. Denies the allegations in paragraph 10 of the complaint.

WHEREFORE, the defendant requests that judgment be entered in its favor and that it be awarded its costs of action.

DAVID C. TRAGER
United States Attorney

By:

Assistant United States Attorney

OF COUNSEL:

VICKI G. CHEIKES
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530
(202) 739-3624

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Answer has this _____ day of February, 1977, been made on counsel for the plaintiff by mail, postage prepaid, addressed to:

Jeffrey D. Ullman, Esquire
410 Park Avenue
New York, New York 10022

VICKI G. CHEIKES
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,
Defendant.

-----x

:

:

:

:

:

76 C 2212

MEMORANDUM
AND
ORDER

Defendant's Memorandum in opposition to plaintiff's motion for summary judgment states (p.2)

"Because Mr. Londono's intent in executing the assignment is crucial in determining its validity, we believe that his testimony, at a deposition and at trial is equally crucial and that his affidavit should therefore not be accepted by this Court as sufficient to establish his alleged intent in executing the assignment. ...

"In addition, on page 11 of plaintiff's Memorandum of Law, it is stated that the plaintiff later reassigned part of the funds assigned to him as security for bail for Mr. Londono's brother. While the plaintiff asserts that this second assignment bolsters his claim that the original assignment was intended to be absolute and irrevocable, we believe that it can equally be construed in exactly the opposite manner, namely, that the assignment was never intended to be absolute, and that if Mr. Londono, or his brother, had need of the funds, or at least part of them, they would be made available with the plaintiff's cooperation."

It would appear desirable that Henry Gomez Londono's deposition be taken on or before April 7, 1977.

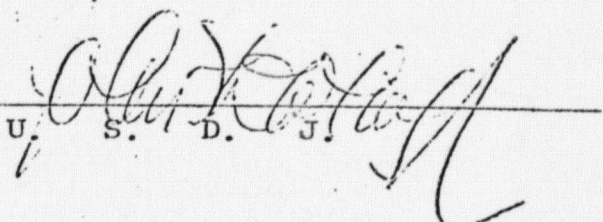
so that it can be transcribed and be available to the parties for the hearing on the afternoon of April 14, 1977. Mr. Gomez Londono is at present in the Queens House of Detention for Men.

It is accordingly,

ORDERED that the deposition of Henry Gomez Londono be taken on or before April 7, 1977, at the Queens House of Detention for Men at a place and hour to be arranged by counsel for the parties with the Warden of the Queens House of Detention for Men before a person authorized to take depositions under Rule 28(a) of the Federal Rules of Civil Procedure.

Brooklyn, New York

March 18, 1977



U. S. D. J.

CIS:ESR:gp
F. 762755

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
IVAN S. FISHER,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
----- X

Notice of Cross-
Motion for Sum-
mary Judgment

Civil Action
No. 76 C 2212

S I R :

PLEASE TAKE NOTICE that, upon the Memorandum and Order of this Court dated December 28, 1976, and upon the Memorandum and Affidavits submitted by plaintiff pursuant to the said Order of December 28, 1976, and upon the Defendant's Memorandum Of Law In Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Its Motion For Summary Judgment, served March 14, 1977 and filed with the Court on March 17, 1977, and upon the Memorandum of this Court dated March 18, 1977, scheduling oral argument herein on April 14, 1977, at 4:30 P.M., and upon all of the other papers and proceedings filed and had herein, the undersigned will, on the date and at the time aforementioned (or as soon thereafter as counsel may be heard), cross-move this Court for the entry of an order granting summary judgment herein to Defendant, and for such other and further and different relief as to the Court may appear just, proper and necessary in the premises.

Dated: Brooklyn, New York
March 24, 1977

Yours, etc.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:

TO:
Jeffrey D. Ullman, Esq.
Attorney for Plaintiff
410 Park Avenue
New York, N.Y. 10022

S
EDWARD S. RUDOFISKY
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E. D. N.Y.

★ MAY 16 1977 ★

----- X
IVAN S. FISHER, :
Plaintiff, :
-against- :
UNITED STATES OF AMERICA :
Defendant. :
----- X

TIME A.M. _____
P.M. _____

JUDGMENT

76-C-2212

A memorandum and order of Honorable John F. Dooling, Jr., United States District Judge, having been filed on May 16, 1977, granting the motion of defendant for summary judgment, and denying the motion of the plaintiff for summary judgment and directing the Clerk to enter judgment that plaintiff take nothing and that the action is dismissed with costs as taxed by the Clerk, it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant and that the defendant's motion for summary judgment is granted and that plaintiff's motion for summary judgment is denied and the action is dismissed with costs as taxed by the Clerk.

Deputy Clerk, May 16, 1977

NOTED
CLERK

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X		
IVAN S. FISHER,	:	
	:	76 C 2212
Plaintiff,	:	
	:	NOTICE OF APPEAL
-against-	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	
-----X		

S I R S:

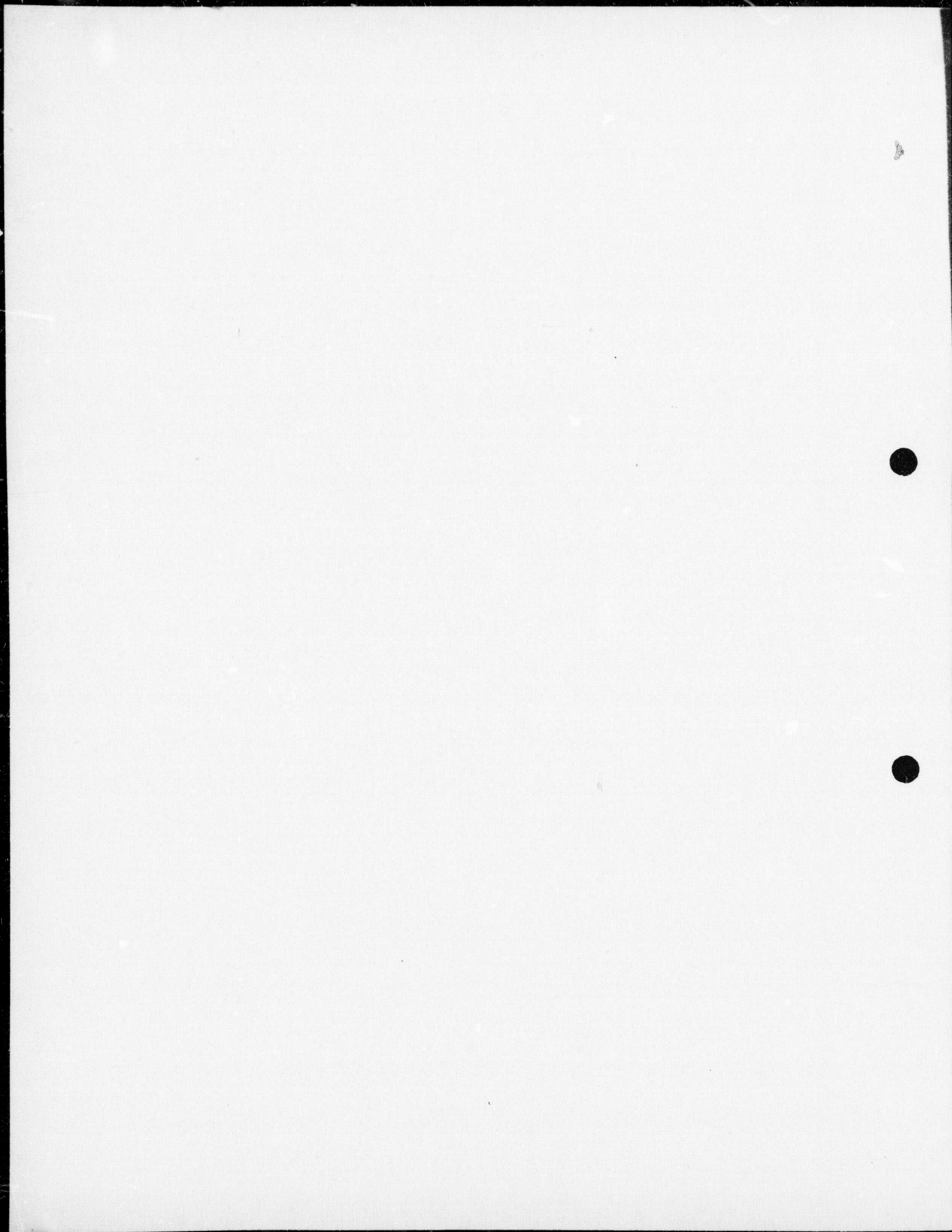
PLEASE TAKE NOTICE that plaintiff Ivan S. Fisher hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered on May 13, 1977, granting summary judgment in the above-entitled action to defendant United States of America, and from each and every part thereof.

Dated: New York, New York
June 24, 1977

Yours, etc.,

JEFFREY D. ULLMAN
Attorney for Plaintiff
Ivan S. Fisher
400 Park Avenue
New York, New York 10022

To: David G. Trager, Esq.
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201



I, Henry Gomez Londono do hereby assign to Ivan S. Fisher, Esq. the following assignment in consideration of legal representation rendered and to be rendered to me by him in defense of a prosecution pending against me in the United States District Court for the Southern District of New York entitled United States of America vs. Henry Gomez Londono, criminal number 75CR153, irrevocably and without condition all my right, title and interest to all United States currency seized from me and my belongings by agents of the United States Government in or about John F. Kennedy airport on or about February 22, 1976, including but not limited to the sum of Forty Seven Thousand Seven Hundred Eighty and no/100 Dollars (\$47,780.00) in United States currency allegedly found in a certain piece of luggage and further including but not limited to an additional Eleven Thousand Dollars (\$11,000.00) seized by agents of the United States Government from my person.

DATED: New York, New York
March 5th, 1976

Henry Gomez Londono
HENRY GOMEZ LONDONO

EXHIBIT A-1

I, Rosario N. Yanez am fluent in the spanish and english languages. I have read the attached document to Henry Gomez Londono in spanish and he told me that he understood the contents of said document.

DATED: New York, New York
March 5th, 1976

Rosario Yanez
ROSARIO N. YANEZ

EXHIBIT A-2

Department of the Treasury

QUEENS HOUSE OF DETENTION FOR MEN

PER 11/10/76

REF: AU:R:900

Tel. #264-3107

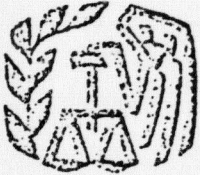
'76 DEC 1 AM 11:08

December 1, 1976

District Director

Internal Revenue Service

P.O. Box 3000, Church St. Sta., New York, N.Y. 10008



Mr. Henry Gomez Londono
c/o The Warden
Queens House of Detention
126-02 82nd Avenue
Kew Gardens, Queens,
New York 11415

Dear Sir:

Under section 6851 of the Internal Revenue Code, you are notified that I have found you design to conceal yourself or your property or do some other act thereby tending to prejudice or render ineffectual collection of income tax for the period January 1, 1976 to May 7, 1976. Accordingly, I have declared the taxable period of January 1, 1976 to May 7, 1976 terminated; and, therefore, the income tax for the terminated period is due and payable immediately.

Demand is made for the tax for the terminated period in the following amount as shown in the attached computation:

Taxable Period	Tax
January 1, 1976 to May 7, 1976	\$50,795.25

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Under section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period. This termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against any assessment which may be made for the terminated period and credited against the tax finally determined to be due on your annual return.

EXHIBIT E-1

You will have an opportunity to request reconsideration of the termination of your taxable period or the amount assessed by filing with this office a written protest within 10 days from the notice of termination of your taxable period, stating reasons why you believe:

1. collection of the liability is not in jeopardy, and/or
2. the assessment is excessive.

A conference will be held on an expedite basis by the District Conference Staff to consider your protest. If you do not want a District conference or if a District conference is held and the matter remains in dispute, your protest will be forwarded to the Regional Appellate Division where a conference will be held on an expedite basis.

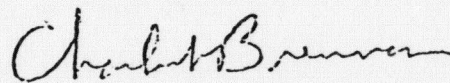
If you submit information or documentation for the first time at an Appellate conference, the Appellate Division may request comment from the District Director on such evidence or documents.

As indicated above, enforced collection action may proceed during any administrative appeal process unless arrangements are made regarding collection of the amount assessed. To make such arrangements, please contact Victor Godfrey, telephone number 264-4522.

Appeal to the Courts

If an agreement is not reached with the Internal Revenue Service, a statutory notice of deficiency is required by law to be issued within 60 days from date of assessment. You will then have 90 days (150 days if outside the United States) from the date the statutory notice is mailed to file a petition with the United States Tax Court.

Very truly yours,



District Director

BJF:jb

December 17, 1976

Special Agent Robert Annunziata
United States Customs Service
6 World Trade Center
New York, New York 10048

Re: United States v. Henry Gomez Londono
Packet No. 153

Dear Agent Annunziata:

Enclosed is a copy of a letter received from Ivan Fisher, Esq., pertaining to the above-captioned case. I am also enclosing a copy of our response dated December 16, 1976.

Inasmuch as Mr. Fisher has agreed, in the event the seized currency is held admissible in any criminal prosecution against Henry Gomez Londono, that he will stipulate, as set forth in his letter, this office does not require, for purposes of a criminal trial, further retention of the monies, in excess of that levied upon by the Internal Revenue Service. Therefore, whether these monies should be retained by the United States Customs Service may be decided without reference to its possible use in criminal proceedings.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: Bernard J. Fried
Assistant U.S. Attorney
Chief, Appeals Division

Encl.

cc: Ivan Fisher, Esq.

EXHIBIT G-2

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

BJF:ec
F.#761,244

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

December 16, 1976

Ivan S. Fisher, Esq.
410 Park Avenue
New York, N. Y. 10022

Re: United States v. Henry Gomez Londono
Docket No. 76 CR 153

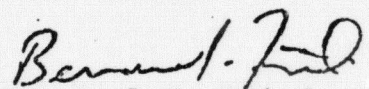
Dear Mr. Fisher:

Reference is made to your letter dated December 10, 1976, concerning the above-captioned case. Enclosed is a copy of a letter sent this date to the United States Customs Service advising them that, as far as this office is concerned, the monies seized from Henry Gomez Londono which have not been levied upon by the Internal Revenue Service need not be retained as evidence in the above-captioned criminal case, in light of your stipulation.

It is understood, in accordance with your letter, that this currency, in the event it is held admissible, would be stipulated to as set forth in your letter.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: 
Bernard J. Fried
Assistant U.S. Attorney
Chief, Appeals Division

Encl.

cc: S/A Robert Annunziata
U.S. Customs Service
6 World Trade Center
New York, N. Y. 10048

EXHIBIT G-1

U.S. CUSTOMS SERVICE

JAMAICA, N.Y.

A-64

March 2, 1976

REFER TO

ENF-4-KF MJ

#1-105

Seizure No. 76-01504

Henry Gomez Londono
32-52 72nd Street
Jackson Heights, New York

Sir:

You are informed that you have incurred the forfeiture of \$11,004.00, pursuant to Title 31 U.S.C. 1103, for the reason that you failed to file a proper report required by the provisions of Title 31, U.S.C. 1101, upon your departure from this port on February 22, 1976, with moneys and/or bearer negotiable instruments in excess of \$5,000.00.

Your attention is invited to the provisions of U. S. Code Title 19, Section 1618, pursuant to which you may file a petition for relief. Customs Regulations, Section 171, provides that your petition for relief be executed in triplicate, signed by the petitioner and addressed to the Area Director, U. S. Customs, Building #178, Federal Circle, JFK Airport, Jamaica, New York 11430. A false statement contained in your petition may subject petitioner to prosecution under the provisions of U. S. Code Title 18, Section 1001.

The petition above shall be filed within sixty days from the date of the mailing of this letter.

Sincerely,

GEORGE F. DUNN
Area Director
J. F. Kennedy Airport Area

By:

Murray Jacobs
Murray Jacobs

Fines, Penalties & Forfeitures



A-65
DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE



April 2, 1976

REFER TO

ENF-4 KF MJ

#1-148

Seizure No. 76-015

Henry Gomez Londono
35-52 72nd Street
Jackson Heights, New York

Sir:

You are informed that you have incurred the forfeiture of \$44,780.00, pursuant to Title 31 U.S.C. 1103, for the reason that you failed to file a proper report required by the provisions of Title 31 U.S.C. 1101, upon your departure from this port on February 22, 1976, with moneys and/or bearer negotiable instruments in excess of \$5,000.00.

With respect to the \$44,780.00, your attention is invited to the provisions of U. S. Code Title 19, Section 1618, pursuant to which you may file a petition for relief. Customs Regulations, Section 171, provides that your petition for relief be executed in triplicate, signed by the petitioner and addressed to the Area Director, U. S. Customs, Building #178, Federal Circle, JFK Airport, Jamaica, New York 11430. A false statement contained in your petition may subject petitioner to prosecution under the provisions of U. S. Code Title 18, Section 1001.

The petition above shall be filed within sixty days from the date of the mailing of this notice.

Sincerely,

GEORGE F. DUNN
Area Director

J. F. Kennedy Airport Area

By:

Murray Jacobs
Murray Jacobs

Fines, Penalties & Forfeitures